NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE:	:	CHAPTER 7
M LIQUIDATING CORPORATION, et al,	:	CASE NO.'s: 03-49338 (NLW)
	:	03-49349
Debtor.	:	03-49353

Before: HON. NOVALYN L. WINFIELD

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Before the court is a motion for summary judgment by the Chapter 7 Trustee and various cross-motions for summary judgment relating to adversary proceedings in which the Chapter 7 Trustee seeks to recover alleged preferential transfers. As set forth at greater length below, the court finds that factual issues abound and summary judgment cannot be granted to any party.

This court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 1334 and 157(a) and the Standing Order of Reference issued by the United States District Court for the District of New Jersey on July 23, 1984. This matter involves core proceedings under 28 U.S.C. § 157(b)(2)(F), and the opinion that follows constitutes the court's findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052.

DISCUSSION

I. Procedural History

On December 5, 2003, involuntary Chapter 7 petitions were filed against M Liquidating Corp., S Liquidating Corp. and Action Wholesale Service, Inc. (Collectively, "Debtors"). The involuntary petitions were filed by Albion Alliance Mezzanine Fund, L.P. and Albion Alliance Mezzanine Fund, II, LP (jointly, "Albion"). Orders for relief were entered against the Debtors on January 13, 2004, and Charles M. Forman ("Trustee") was thereafter appointed as the Chapter 7 Trustee. Subsequently, at the request of the Trustee, on February 28, 2005 an order was entered authorizing the joint administration of the Debtors' cases.

In June, 2005 the Trustee filed approximately 200 adversary proceedings, claiming that the Debtors' former trade vendors received preferential transfers. The Trustee grounds his preference actions in the pre-petition sale of substantially all of the assets of the Debtors' predecessors: Emco Sales

and Service, Inc. ("Emco"), ESS Holding Corp. ("ESS") and Action Wholesale Service, Inc. ("Action"). As part of the sale transaction the acquirer assumed approximately $20 million in vendor liabilities owed by Emco, ESS and Action. The Trustee contends that the funds paid to the trade vendors constitute part of the purchase price for the Debtors assets and are recoverable as preferential payments. At the request of the Trustee and various defendants, on August 29, 2005 the Court entered a Global Scheduling Order for Preliminary Issues in Adversary Cases. The order provided for the Trustee to file a summary judgment motion that addressed the following issues: (i) whether payments made to the defendants by the acquirer of the Debtors' business constitute transfers of property of the Debtors, and (ii) whether, as a matter of law, the defendants are entitled to assert the affirmative defenses set forth in 11 U.S.C. §547(c)(2) and (4).[1] When he filed his summary judgment motion the Trustee unilaterally added the issue of whether the alleged transfers of the Debtors' property occurred when the sale closed, or at the time the payments were made.[2]

Cross-motions for summary judgement were filed by A.T. Cross Company, Access Global, Inc., ACCO Brands, Inc., General Binding Corporation, Gould Paper Corp., Gassco Manufacturing, Inc., The HON Company, Lindenmeyr Munroe, Peach Office Products, The Smead Manufacturing Company and TST/Impreso, Inc.[3] Opposition to the Trustee's motion was filed by Avery Dennison Corp., Carey

[1]Under the order the summary judgment motion and the oppositions and/or cross-motions were all filed in the main case rather than each adversary proceeding.

[2]Because this issue was not a subject of the August 29, 2005 Order, the Court declines to address it at this time.

[3]The following parties filed responses and joinders to cross-motions for summary judgment: Avery Dennison Corporation, BIC USA, Inc., Binney & Smith, Inc., C-Line Products Corp., Cardinal Brands, Inc., Classic Coffee Concepts, Inc. f/k/a Mr. Coffee Concepts, Fellowes Inc., Fire King International, Inc., Houghton Mifflin Company, Iceberg Enterprises, International Paper Company, xpedx Division, Lee Metal Products, Max USA Corp., Maxon Furniture Inc., MeadWestvaco Corp., Packaging Credit Company LLC, Penske Truck Leasing Co. L.P., Pentel

Assets, Inc. d/b/a Millennium Technologies, Catherine Adams, eCommerce Industrials, Inc., Esselte Corp., Fire King International, Inc., Local 1102 Health and Benefit Fund, Mead/Westvaco, Neamco Office Products, Prestige Delivery Systems, the Unofficial Joint Defense Committee[4] and Velocity Express, Inc.[5]

II. The Sale Transaction

A. The Trustee's Version of the Sale Transaction

The Trustee states that on September 19, 2003, ESS, EMCO and Action consummated a sale of substantially all of their assets to Action EMCO Holdings, LLC pursuant to the terms of an asset purchase agreement dated September 19, 2003. (the "APA"). *(Trustee's Brief, Ex. A (APA) and Ex. E (Robert S. Everett ("Everett") 2004 Examination at 88:13-16)).* After the sale, the Debtors ceased

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of America Ltd., Presidential Industrial Products, Quality Park Products, an unincorporated operating division of Cenveo Inc., Rogers Printing, Inc., Rubbermain Commercial Products LLC, Sanford LP, Sheaffer Pen, a Division of BIC USA, Topps Business Forms, a division of Moore .

[4]The following parties are jointly represented by and have been referred to as the "joint defense committee": Active Computer Supplies, Inc., Aetna Inc., American Tombow, Inc., Bretford Manufacturing, Inc., Creative Mechandise Co., Deflectco Corp., Dixon Ticonderoga Company, Frank Parsons Paper Co., Holland Special Delivery Co., Norstar Office Products, Inc., d/b/a Boss Office Products, Officemate International Corp., Pilot Corp. of America, d/b/a Pilot, Riverside Paper Corp., Southworth Paper Co., Staedtler Inc., The Gillette Company, d/b/a Duracell.

[5]In addition, the following parties have filed responses and or joined in other responses and oppositions to the Trustee's motion: 3M Company, American Pad and Paper LLC, Baumgarten's Canon USA, Inc., Durable Office Products, E.S. Robins Corp., Eastern Distributing Co., Elmer's Products, Inc., Gemstar, Inc., Get a Job Personnel Services, Hunt Manufacturing Co., Ken Edwards, Lee Products Company, Pentel of America Ltd., Pison Technology Solutions, PM Company, Quebecor World Pendell, Inc., S&S Systems, LLC, Sentry Group, Stanley Fastening Systems, L.P. d/b/a Stanley-Bostitch, Texas Instruments, United Receptacle, Inc., Victor Calculator a/k/a Victor Technologies, Webster Industries, Inc.

operations. The Trustee also contends that as of the sale date the Debtors were insolvent *(Trustee's Brief, Ex. B (ESS Sept. 19, 2003 Balance Sheet)).*

The Trustee concludes that the total purchase price paid by ActionEmco exceeded $40 million. The Trustee first points to § 3.1 of the APA which he claims provides that the consideration for the purchased assets is a cash payment of $23.1 million (subject to adjustments for net working capital) and the assumption of certain liabilities, including the obligations to the Debtor's trade vendors. *Trustee's Brief, Ex. A).* Next, he refers to the schedule of ESS Consolidated Accounts Payable to establish that as of September 19, 2003 the assumed liabilities amounted to $21.684 million. *(Trustee's Brief, Ex. C).* By adding the cash component to the assumed liabilities the Trustee produces a total purchase price in excess of $40 million.

The Trustee alleges that after September 19, 2003 ActionEmco made payments to the defendants on account of liabilities owed to them prior to September 19, 2003. *Affidavit of Ben Kohen ("Kohen Aff.") ¶ 3).* The total assumed liabilities paid by ActionEmco amounted to $22,744,919.00. *Kohen Aff., Schedules 1 & 2).* However, these assumed liabilities did not include all of the Debtors' outstanding liabilities at the time of the sale.

In his reply to to the cross-motions for summary judgment or dismissal the Trustee supplied an affidavit and additional snippets of Rule 2004 examinations of various parties as well as pre-sale correspondence among the parties. The additional exhibits do not alter the Trustee's facts and are not significantly helpful as they are all capable of being interpreted differently.

B. The Defendants' Version of the Sale Transaction

The Defendants provide facts that place the September 19, 2003 APA and sale to ActionEmco in the context of a sale process. According to the Defendants, the sale process began in January, 2003 when the Debtors engaged the firm of Butler, Chapman & Co., LLC ("Butler Chapman") to assist with the sale of the Debtors' business. (Declaration of Samuel R. Grafton ("Grafton Decl."), Ex. A). In furtherance of the sale effort, Butler Chapman identified and contacted 146 entities to ascertain their interest in acquiring the Debtors. *(Id.).* Forty-nine entities expressed interest and were sent a descriptive memorandum, describing the Debtors' business. *(Id.)* Ultimately, five preliminary bids were received, including one from Centre Partners Management LLC ("Centre"). *(Id.).*

Robert K. Scribner ("Scribner") who became the President and CEO of ActionEmco, worked with Centre to develop its bid. Centre submitted proposals dated May 29, 2003, June 4, 2003, June 25, 2003 and July 14, 2003, which culminated in the APA executed by the Debtors and ActionEmco on September 19, 2003. *(Grafton Decl. Ex. B., Decl. of Robert Scribner "Scribner Decl." ¶ 5).* Scribner avers that all of Centre's proposals were predicated in the sale occurring outside of bankruptcy. *(Id.)* He further asserts that good customer relationships are essential to insuring an uninterrupted flow of product to fill customer orders. *(Id.)* The Court infers that Scribner's point is that he and Centre believed that if they acquired the Debtors' assets through a bankruptcy sale, ActionEmco would have difficulty reestablishing business relationships with trade vendors who might receive only a minimal distribution in a bankruptcy case.

Scribner also states that although Centre initially negotiated sale terms with Butler Chapman and Debtor's management, the Debtors' secured lender group led by IBJ/Whitehall Business Credit Corp.

("IBJ") became increasingly involved as the sale process continued.[6] Scribner's declaration also indicated that other entities were actively bidding. He states that Centre was repeatedly told to improve its bid since two other bidders were actively competing for the business. *(Id., ¶ 9).* In fact, Scribner claims that the petitioning creditor, Albion was an active bidder.[7] *(Id.)* Scribner further avers that during this period "it became increasingly clear that, in addition to having to fund the auction process, IBJ was not going to be repaid in full as a result of the transactions." *(Id. ¶ 7).* Scribner also claims that by the time the APA was agreed upon "the process had turned into a secured creditor controlled sale of its collateral and, since IBJ would have a shortfall in it collateral, negotiations became increasingly difficult."[8] *(Id. ¶ 9).* Moreover, Scribner states that IBJ "insisted on conducting a going concern sale because, based on a collateral appraisal, it believed that a liquidation in bankruptcy would have brought a smaller recovery and resulted in a greater deficiency." *(Id.).* At some point in the sale process, Webster Bank became the successor in interest to IBJ.[9] (*Id. ¶ 7*).

According to Scribner's declaration, neither he nor any Centre employees discussed the status of the vendor payables with the trade vendors prior to consummation of the sale of the Debtors' assets to ActionEmco. *(Id. ¶ 8).* Declarations submitted by employees of the trade vendors also suggest that the trade vendors were not involved in the sale negotiations. *(See, Declaration of Timothy D. Brown,*

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[6]The lender group held a lien on substantially all of the Debtors' assets as well as a restrictive covenant governing asset sales. (Scribner Decl. ¶ 7).

[7]Scribner also states that during the due diligence period he learned that Albion's claim was subordinated and payment on the claims was deferred until full payment of IBJ. (Scribner Decl. ¶ 9).

[8]Scribner asserts that IBJ's consent was a necessary component of the sale. *(Id. ¶ 7)*

[9]To avoid confusion, the Court will continue to refer to IBJ as the Lender in the remainder of this opinion. "IBJ" is intended by the Court to be a reference to Webster Bank.

Affidavit of Marshall Sorokwasz and Declaration of R. David Bitting).

As stated earlier, Centre's bid was ultimately accepted and the APA was executed between the Debtors and ActionEmco as the designee of Centre. Under the terms of the APA ActionEmco purchased substantially all of the Debtors' assets, described in the APA as "all of the business assets, properties, contractual rights, goodwill, going concern value, rights and claims of the Sellers and the Subsidiaries related to the Business...." (*Trustee's Brief, Ex. A § 2.1).* ActionEmco agreed to pay an Initial Purchase Price of $19,963,000, subject to upward adjustment for working capital requirements and a three year earn-out provision, capped at $20,719,000. *(Id., Ex. A § 3.3(g)).* This Initial Purchase Price was determined by applying a multiple to the Debtors' actual and projected EBITDA. *(Scribner Decl. ¶ 6, 11).* Vendor payables were not a component of the Initial Purchase Price except to the extent that they contributed to an adjustment to the Initial Purchase Price through an adjustment of the net working capital. *(Id. ¶ 11).* As part of the sale transaction, IBJ consented to the sale and released its liens. *(Id. ¶ 7, 12).* In turn, the Debtors assigned all rights to receive any additional funds to IBJ. *(Id. ¶ 12; Trustee's Brief, Ex. D).* Further, despite its deficiency, IBJ funded the sum of $1,240,000 to satisfy the expenses of sale. *(Scribner Decl. ¶ 12).*

III. Summary Judgement Standard

Fed. R. Civ. P. 56(c), which is made applicable to this adversary proceeding through Fed. R. Bankr. P. 7056, states in relevant part:

> The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law.

Fed. R. Civ. P. 56(c).

When a party files for summary judgment, the role of the court is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249(1986).* The court must interpret the facts and evidence in a light that is most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).* However, the "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson, 477 U.S. at 247-48.* A fact is considered material if it "might affect the outcome of the case, and an issue is genuine if the evidence is such that a reasonable fact finder could return a verdict in favor of the nonmovant." *In re Headquarters Dodge, Inc., 13 F.3d 674, 679 (3rd Cir. 1993)(citing Anderson v. Liberty Lobby, Inc., 477 U.S. at 248).*

The initial burden is on the moving party to point to "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrated the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Thereafter, the burden shifts to the nonmoving party to identify specific facts which demonstrate there is a genuine issue of material fact for trial. *Fed. R. Civ. P. 56(e).* There is no genuine issue for trial only if the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party. *Matsushita, 475 U.S. at 585-87.*

IV. Payments to Defendants as Preferential Transfers

Substantive law provides the basis for identifying which facts are material, and "[o]nly

disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgement." *Anderson v. Liberty Lobby, 477 U.S. at 248.* Under Code § 547(b) a trustee may avoid any transfer of an interest of the debtor in property that is

> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made --
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
> (5) that enables such creditor to receive more than such creditor would receive if --
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). The trustee has the burden of proving the avoidability of an alleged preferential transfer, and the party against whom recovery or avoidance is sought has the burden of demonstrating the nonavoidability of such a transfer. 11 U.S.C. § 547(g). As demonstrated in the paragraphs that follow, genuine issues of material fact exist with regard to whether all of the elements of a preference have been established..

The Trustee views the sale transaction as one in which ActionEmco paid approximately $40 million for the Debtors' assets.[10] Under the Trustee's analysis (i) ActionEmco paid cash of approximately $21.2 million at closing, which was used to pay the bank group, led by IBJ and (ii)

[10]Neither the Trustee nor the Defendants have supplied the Court with precise numbers. For purposes of this motion exact figures are not required, and the Court adopts the "approximate approach" used by the parties.

ActionEmco retained approximately $21.684 million which it paid to the defendants. The central issue then, is whether the payments to the defendants were transfers of the Debtors' property within the meaning of § 547. The foundation for the Trustee's conclusions is § 3.1 of the APA which he argues clearly states that the total consideration for the Debtors' assets "is comprised of the Initial Purchase Price and the assumption of certain vendor liabilities." *Trustee's Reply Brief, p. 5).* He rejects the contrary facts offered by the defendants as inadmissable parol evidence. However, he also claims that, even if considered, the defendants' evidence demonstrates that the assumption of the vendor liabilities was always a component of the purchase price.

The problem with the Trustee's position is that its foundation cannot support his argument. Article 3.1 of the APA, entitled simply "Consideration," states:

> The aggregate consideration for the Purchased Assets to be paid on the Closing Date shall be (a) an amount in cash equal to $23,100,000 (the "Initial Purchase Price"), subject to adjustment as provided in Section 3.3, and (b) the assumption of the Assumed Liabilities (together with the Initial Purchase Price, the "Total Consideration").

Noticeably absent from the paragraph is any description of "Assumed Liabilities" or a dollar value for "Total Consideration."

In part, a description of Assumed Liabilities is set forth in § 2.3(a) of the APA, which provides for assumption of:

> all liabilities of the Sellers and Subsidiaries under the Purchased Contracts listed in Schedule 2.1(h) (including, without limitation, insurance policies) and those arising in the Ordinary Course of Business between the date thereof and the Closing as permitted under the terms of this Agreement that arise out of or relate to the period from and after the Closing Date;

The Purchased Contracts listed in Schedule 2.1(h) include such items as license agreements, employment agreements and a number of accounts (approximately 66) with security agreements.

There is no category described as vendor accounts payable, or the like.

Section 2.3(b) of the APA further provides for assumption of the following liabilities:

> other than the Excluded Liabilities enumerated in Section 2.4(a) through (j), all Liabilities of Sellers in respect of the Business existing as of the Interim Balance Sheet Date, but only if and to the extent that the same are accrued or reserved for in the Interim Balance Sheet and remain unpaid and undischarged on the Closing Date.

The Trustee has offered no delineation of this category, and from the mere description it is not possible to determine what liability or what amount falls within § 2.3(b).

Section 2.3(c) of the APA provides for assumption of the following liabilities:

> (c) all liabilities and obligations of Sellers in respect of the Business arising between the Interim Balance Sheet Date and the Closing Date, but only if and to the extent that the same remain unpaid and undischarged on the Closing Date and are included in the calculation of Net Working Capital

This section describes liabilities arising between the Interim Balance Sheet Date (defined in § 5.4 of the APA as June 30, 2003) and the Closing Date Balance Sheet (September 19, 2003). There are no supporting documents supplied by the Trustee that show what liabilities fit within this category. Sections 2.3(d) and (e) of the APA describe employment compensation obligations that do not involve trade vendors, and thus are not relevant. Accordingly, it is amply evident that neither § 3.1 nor 2.3 of the APA are clear and precise and it is necessary to consider the facts of the entire sale process in order to determine whether payment of the trade vendors was part of the purchase price for the Debtors' assets.

The Trustee's proffer of the parol evidence rule lacks force. It is well recognized that the parol evidence rule prohibits the introduction of evidence that tends to alter an integrated written document. *Conway v. 287 Corporate Center Assoc., 187 N.J. 259, 268 (2006).* However, the New

Jersey Supreme Court follows an expansive view of the parol evidence rule under which the court considers all relevant evidence that assists in determining the intent and meaning of a contract. *Id.*, *at 269.* In *Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301-302 (1953)* the New Jersey Supreme Court explained that:

> Evidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement. This is so even when the contract on its face is free from ambiguity. The polestar of construction is the intention of the parties to the contact as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded. The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. Such evidence is adducible only for the purpose of interpreting the writing-not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said. So far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant. The judicial interpretive function is to consider what was written in the context under which it was written, and accord to the language a rational meaning in keeping with the expressed general purpose. (citation omitted).

The Trustee relies heavily on *Warsco v. Preferred Technical Group, 258 F. 3d 557 (7th Cir. 2001),* however, it does not provide a basis for deciding the Trustee's summary judgment motion in his favor. Tellingly, in that matter the Seventh Circuit reversed the district court's grant of summary judgment in favor of the defendant because it determined that disputed issues of fact (arising from circumstances similar to the instant matter) precluded the grant of summary judgment.

The Seventh Circuit thoroughly reviewed the competing summary judgment motions presented to the district court and concluded that two genuine issues of material fact existed: (i) whether the asset purchaser's payment of $500,000 to a creditor was a transfer of an interest of the

debtor in property and (ii) whether the asset purchaser's payment of $500,000 was "for or an account of" an antecedent debt. The Court noted, *inter alia*, the terms of the asset purchase agreement, the affidavits of the parties purporting to explain the transaction, the financial condition of the parties post-closing, the subsequent bankruptcy filing, and the relevant case authority. *258 F. 3d at 560-565.*The court concluded that the record before it supported two alternative conclusions:

> Thus, we are left to determine if there is a genuine issue of triable fact as to whether the practical effect of the transactions was to funnel $500,000 of the purchase price for Presidential's assets to PTG, or whether LLC's payment to PTG was truly independent of its purchase of Presidential's assets. We believe that the record evidence permits two rational interpretations of the transaction that occurred in this case. It is clear from the correspondence among the parties to the transaction that PTG was not going to consent to this asset sale unless it received what it considered fair compensation for the note it held against Presidential. In response to this obstacle, the parties may have put their collective heads together to restructure the deal so as to divert $500,000 of the purchase price to PTG without involving Presidential directly in the transfer. Alternatively, LLC may have believed that refusing to appease PTG would threaten the viability of the deal. In order to save the deal and to promote its own business purposes, then, LLC may have decided to pay PTG itself.

Id., at 566. Moreover, the court found that important facts, such as how the parties reached their initial valuation of the Debtor's assets, were simply unknown. *Id. at 568.*

In the matter at hand, we have even fewer facts. Neither the Trustee not the defendants appear to have engaged in any real discovery. The Trustee took some 2004 examinations of the participants in the sale transactions, but none of the defendants were present when the testimony was given. Nor has the Trustee had an opportunity to depose Mr. Scribner. Thus, as in *Warsco* there are simply too many facts in conflict, or unknown. At most, *Warsco* merely provides the Trustee with a theory of recovery.

Similarly, *Cage v. Wyo-Ben, Inc. (Matter of Ramba), 437 F. 3d 457 (5th Cir. 2006)* merely

affords the defendants a very plausible defense to the Trustee's preference action. Prior to its bankruptcy, Ramba, Inc. ("Ramba") sold a drilling division to Patterson Energy, Inc. ("Patterson"). As part of the consideration Patterson assumed some of Ramba's obligations to its creditors. At the time that the sale occurred, Ramba's assets were fully encumbered. However, the bank agreed to release its liens and to permit some of the purchase price to be utilized to pay Ramba's debts. *437 F. 3d at 459.* After Ramba's bankruptcy filing, the trustee sought to recover the payments to the creditors as preferential transfers. The Fifth Circuit observed that no preference results if property is transferred in which the debtor has no equitable interest. *Id. at 460.* It also noted that the trustee conceded that Ramba's assets were fully encumbered and that the lender was owed more than the value of the debtor's assets. *Id., ftn 3.* Accordingly, the court found that because Ramba had nothing more than bare legal title to the sale proceeds the payment to the creditors could not be avoided. *Id. at 461.*

While the *Ramba* opinion from the Fifth Circuit contains persuasive analysis, the dearth of discovery performed to date requires denial of the defendants' cross-motions for summary judgment. For example, the factual support for the cross-motions rests largely on the Scribner affidavit. As yet, the Trutsee has not examined Mr. Scribner. Further, unlike Ramba, the Trustee has not conceded that the Debtors' assets were overencumbered. Moreover, the record is devoid of any valuation of the Debtors' assets.

V. Defenses to the Preference Actions

The Trustee's contention that the Defendants cannot assert the defenses to a preference action is unpersuasive. The Trustee cites no case authority that is on point, and notably, there is no

provision in § 547 for denying creditors the ability to use the § 547(c) defenses. In fact, courts have presumed that Code § 547(c) defenses apply even when the creditors received the alleged preferential transfers from a third party acquirer. *Ramba, 437 F. 3d 457 at 462; In re Food Catering & Housing, Inc., 971 F. 2d 396, 398 (9th Cir. 1992) and In re S.E.L. Maduro, 205 B.R. 987, 991 (Bankr. S.D. Fla. 1997).* The Trustee in his preference actions contends that the Court should view ActionEmco as if it is the Debtor, and thus find that the payments are preferential. The Trustee cannot ask the Court to entertain his theory, but deny creditors the defenses to his theory. To do so would be inequitable.

CONCLUSION

Due to the conflicting factual record, the Trustee's summary judgment motion and the cross-motions for summary judgment and /or dismissal are denied.